Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications	)	
Capability	)	
	)	
Petition for Reconsideration of Earthlink	)	

REPLY TO OPPOSITIONS OF THE COALITION FOR HIGH-SPEED ONLINE INTERNET COMPETITION AND ENTERPRISE (CHOICE)[1]

The Bell Operating Companies are unanimous in their opposition to line sharing, because it permits carriers seeking to provide competitive broadband services to consumers to do so on a level playing field with the incumbent carriers.[2] The Bells do not dispute that it is economically, technically, and practically impossible to provide digital subscriber line (DSL) service to residential consumers without access to line sharing, as indeed they cannot. Nor do the Bells provide any support for their argument

[1] CHOICE member companies include the companies listed at the end of this reply. Covad Communications Company, an original participant in this coalition, does not join this reply.

[2] Interestingly, other than the Bell companies, only one single party opposed the Earthlink Petition. *See* Opposition of Catena Networks, CC Docket Nos. 01-338, 98-147, 96-98, filed Nov. 6, 2003. It is unclear why Catena alone among the entire telecommunications sector elected to file in opposition to Earthlink's request. Not even the High Tech Broadband Coalition (HTBC) filed comments opposing the Earthlink Petition for Reconsideration; indeed, in prior filings, the HTBC has taken the position that additional fiber deployment is promoted by the maintenance of certain copper unbundling requirements.

that they are further encouraged to deploy broadband services by the *absence* of competition, as indeed they could not. The Bells also fail to explain why members of this Coalition – all of whom have fulfilled the Commission's policy goal of widespread deployment of broadband services to underserved and rural areas of the country – should have the rug yanked out from under them by the Commission.

At the same time as the Bells (not surprisingly) try to preserve this unsound reduction in broadband competition, support for line sharing in the CHOICE petition record[3] (filed in September of 2003) came from, among others, the state public utility commissions (represented by their trade association, NARUC), the state public utility consumer advocates (represented by their trade association, NASUCA), as well as AT&T, MCI, Earthlink, the Competitive Telecommunications Association (Comptel), the Association for Local Telecommunications Services (ALTS), and the Information Technology Association of America (ITAA). Support for line sharing also came from members of Congress, including a notable letter to the Commission dated September 25, 2003, from five Republican Senate Commerce Committee members: Senators Snowe (R-ME), Allen (R-VA), Sununu (R-NH), Grassley (R-IA), and Fitzgerald (R-IL).

CHOICE members are facilities-based competitive local exchange carriers (CLECs) that provide broadband DSL services to thousands of consumers in the country using the line sharing UNE. These companies have fought incumbent phone company intransigence to bring broadband services to consumers who would otherwise have no broadband options. Now, these companies are fighting to preserve broadband choice in

[3] The Commission should incorporate by reference into the instant proceeding the record developed in support of the CHOICE petition for emergency stay. To the extent a motion is necessary to incorporate the CHOICE record, the instant commenting parties so move the Commission.

the face of an FCC decision that fails to recognize the benefits of competitive broadband services. The legacy of this Commission, in the absence of affirmative grant of the Earthlink petition, will be a quick end to residential broadband competition.

I. The Commission has clear legal authority to readopt line sharing on reconsideration

The Commission has wide discretion to act on reconsideration to change its prior rulemaking determinations in any manner. All that is required of the reconsideration petition is that it "state with particularity the respects in which petitioner believes that the action taken should be changed."[4] Moreover, the Commission can grant reconsideration based if "petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."[5] Should the Commission choose to do so, reconsideration can also be granted based on facts or other "circumstances which have changed since the last opportunity to present them to the Commission."[6] Earthlink demonstrates numerous new facts, as well as errors in the Commission's reasoning:

- The Commission had a mistaken understanding of the substitutability of line splitting for line sharing. Line splitting, by definition, cannot be a substitute for line sharing,

[4] 47 CFR § 1.429 (c). *See also North American Telecommunications Ass'n v. F.C.C.*, 772 F.2d 1282, 1286 (7th Cir. 1985) ("The Commission's rules of procedure, however, contain a catch-all provision that allows the Commission to reconsider its decision de novo even if no new material is presented, see 47 C.F.R. § 1.429(b)(3).").

[5] *In The Matter Of Infinity Radio License, Inc*., 17 FCC Rcd. 18,339 (2002) (referring to the Commission's mass media reconsideration rule in 47 CFR § 1.106). For example, the Commission concluded in the Triennial Review Order that cable has "first mover advantages and scope economies not available to new entrants," and thus new entrants cannot deploy their own copper loop plant to provide voice services. Order at para. 98. But the Commission reached the exact opposite conclusion in the line sharing section.

[6] 47 CFR § 1.429(b)(1).

because the approximately 95% of Americans who still receive local phone service from an incumbent LEC cannot purchase line split DSL services.[7]

- In any event, line splitting is not fully implemented, as demonstrated by the extensive record developed in the CHOICE petition for stay, and thus cannot be a legal substitute for line sharing. Indeed, in the Triennial Review Order, the FCC for the first time granted a three year old petition regarding the applicability of line splitting to UNE-P and stated that it "expect[s] incumbent LECs to implement, in a timely fashion, practical and reasonable measures to enable competitive LECs to line split."[8]
- The Commission based its line sharing phase-out "largely" on the complexities of pricing the HFPL.[9] The Commission subsequently opened a TELRIC rulemaking proceeding and can resolve this pricing issue there, consistent with the Commission's conclusion in the Triennial Review proceeding that TELRIC problems with switching did not justify eliminating the switching UNE.[10]
- SBC recently announced (October 22, 2003) its third quarter 2003 DSL results, which SBC called "the company's best-ever DSL net-add quarter and its seventh straight

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[7] Specifically, the FCC's latest report shows that, as of December 2002, approximately 10.2 million access lines were being served by the UNE-Platform. *See Local Telephone Competition: Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, at Table 4 (June 2003) ("UNEs with Switching"). The report indicates a total of approximately 188 million switched access lines nationwide. *Id.* at 1. Thus, UNE-P accounts for approximately 5% of the total access lines in service.

[8] Triennial Review Order at para. 252 n. 752.

[9] *Id.* at para. 260.

[10] Triennial Order at para. 450 n.1374. The Commission's line sharing pricing rules require incumbents to comply with a principle of non-discrimination. Specifically, its pricing rules required competitors to pay for the HFPL the same loop cost the incumbent allocated to its own line shared xDSL services. How a rule requiring pricing non-discrimination for the HFPL results in an "irrational cost advantage over competitive LECs purchasing the whole loop and over the incumbent LECs" is anybody's guess. Order at para. 260.

quarter of sequential growth in DSL net adds."[11] Line sharing relief did not take effect until after the third quarter, negating the Commission's conclusion that line sharing relief is needed to promote DSL deployment by ILECs. Indeed, SBC is now the second largest broadband provider in the country – trailing only Time Warner.

- The Commission mistakenly concluded that video services can be offered over line shared ADSL. Bundling of voice, data, and video to compete with cable is not possible over line shared copper loops. Indeed, in its most recent cable report, the Commission concluded that that video over DSL "remain[s] in the trial stage."[12] Thus, the "additional revenue opportunity" that the Commission concluded would be available to CLECs that lost line sharing access is in fact not there.

II. The ILECs misconstrue the requirements of *USTA v. FCC*

Contrary to the ILECs' characterization of *USTA v. FCC*, that decision in no way prevents the Commission from re-adopting the line sharing UNE. On the contrary, the language of the opinion and the court's decision to stay its mandate both make clear that the Commission was permitted under *USTA* to readopt the line sharing UNE, so long as the Commission undertook the analysis set out by the court.

The D.C. Circuit "remand[ed] both the *Line Sharing Order* and the *Local Competition Order*[13] to the Commission for further consideration in accordance with the principles outlined" in its decision.[14] In its decision the court specifically affirmed the

[11] SBC press release, available at http://www.sbc.com/press_room/1,,31,00.html?query=20698.

[12] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report, 17 FCC Rcd 26901, para. 98 (2003).

[13] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999) ("*Local Competition Order*"), *modified*, 15 F.C.C.R. 1760 (1999).

[14] *USTA*, 290 F.3d at 430.

FCC's judgment that the high frequency portion of the loop properly qualified as a discrete "network element," a critical cornerstone of the Commission's *Line Sharing Order*.[15] In other words, the Court held that the upper frequencies of a loop fit the Act's legal definition of a network element, and thus could properly be unbundled by the Commission. The Court nevertheless remanded the *Line Sharing Order* on the ground that the FCC did not consider whether ordering the incumbent carriers to share the high frequency portion of the loop would benefit or harm competition in general.[16]

In so ruling, the court remained appropriately agnostic on whether, after performing the requisite analysis, the FCC could re-impose its line sharing rules on remand. That evidence was not before the court. Indeed, if the Court had concluded that line sharing was unlawful no matter what the evidence showed on remand, it would not have remanded the matter to the FCC at all.[17] Administrative agencies routinely reinstate orders remanded because the agency failed to consider relevant evidence based on a misunderstanding of the law.[18]

Moreover, subsequent to its decision, the Court granted a petition to stay the mandate relating to the *Line Sharing Order* until January 2, 2003.[19] The court also

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[15] *USTA,* 290 F.3d at 429.

[16] *USTA,* 290 F.3d at 428-29.

[17] *Cf Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994) (holding that remand for further proceedings was not warranted where there did not appear to be *any* basis to support the agency's rule). *See also WorldCom, Inc. v. FCC,* 288 F.3d429, 434 (D.C. Cir. 2002) (rule remanded where there exists a "non-trivial likelihood" that agency could reinstate rule on remand after considering the relevant factors).

[18] *See, e.g.,* III Pierce, Jr. *Administrative Law Treatise* at § 18.1, p. 1325 (4th Ed.) ("if the judicial decision was based on the court's conclusion that the agency action was predicated on a misunderstanding of applicable law, the agency often can support the same action on remand with a set of reasons or findings that is consistent with the applicable law announced by the reviewing court").

[19] *See Order* dated September 4, 2002, 2002 WL 31039663 (D.C. Cir. 2002), citing *Triennial Review NPRM* ¶ 81

granted a subsequent petition to extend the length of the stay to allow for the conclusion of the Commission's *Triennial Review* proceeding.[20] Obviously, the Court would not have granted these motions if it believed that the line-sharing rules could not be reinstated consistent with its decision; to the contrary, the prospect that those rules would be reinstated was the very predicate of the relief requested in the petition to stay the mandate and the petition to extend the stay.

Thus, the *USTA* decision clearly leaves open the possibility that the Commission could well have reinstated the line sharing rules on remand. What is missing from the Commission's Order, however, is an application of the actual standard set out by the *USTA* court. Although the Commission makes a facial attempt to address *USTA* by invoking intermodal competition from cable modem, satellite, wireless and other sources, the Commission fails to properly undertake the analysis required by *USTA*.[21] For example, the Commission ignores the fact that, as the Commission's own statistics reveal, in many areas of the country DSL rather than cable modem is the dominant form of broadband service.[22] Beyond making more than passing reference to the existence of alternative network platforms, the Commission makes little analysis of the larger competitive context for broadband services.[23]

The only other justification for eliminating line sharing cited by the Commission is that its availability somehow "skews" competitors towards providing broadband-only

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[20] *See Order* dated December 23, 2002, (extending stay until February 27, 2003).

[21] *See* Order at para. 262.

[22] *See, e.g.,* Goldman Sachs Global Telecom Weekly, "The Americas – US Spotlight" (Aug. 18, 2003) ("…there are several states, including the largest (California) where DSL actually holds the market-share advantage") (citing data from the FCC report "Trends in Telephone Service" (Aug. 2003)).

[23] *See* Order at para. 262.

services, rather than voice and data bundles.[24] What exactly is skewed about providing data-only services to satisfy consumer demand for data-only services? Again, the Commission's reasoning is something of an economic mystery.

III. Preservation of line sharing is consistent with Commission's policy of deregulating next-generation networks and promoting fiber deployment.

The Triennial Order preserves unbundling obligations for legacy (copper) networks while largely eliminating such obligations for new (fiber) networks, and applies that policy throughout the Order, with one notable exception: line sharing. As to local loops, the Commission concluded that "requesting carriers are generally impaired on a national basis without unbundled access to an incumbent LEC's local loops, whether they seek to provide narrowband or broadband services, or both."[25] The Commission also concluded as a policy matter that "our obligation to ensure the deployment of advanced telecommunications capability under section 706 warrants different approaches with regard to existing loop plant and new loop plant."[26] The Commission therefore held that copper loops must be available as UNEs, because "[t]he costs of local loops serving the mass market are largely fixed and sunk."[27] As to fiber loops, however, the Commission concluded that "the record indicates that carriers can earn significant returns on their fiber-based investment by providing a suite of services ranging from traditional voice to full-motion video."[28]

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[24] *See Order* at para. 261.

[25] Order at para. 248.

[26] Order at para. 244.

[27] Order at para. 237.

[28] Order at para. 240.

This bifurcation of unbundling (copper versus fiber) should logically have resulted in the Commission continuing to require unbundling of line sharing. It is undisputed, for example, that such revenue streams as video are not available over copper loops, including line shared loops. Moreover, the availability of line sharing over legacy copper facilities actually incents incumbent LEC to deploy fiber loop facilities; in order to stave off competitors' line shared xDSL services and "reap the rewards of delivering broadband services to the mass market." Without line sharing, incumbents have incentive to maintain legacy copper loop facilities, rather than upgrade them to fiber.

In addition, the state of intermodal competition suggests that line sharing, not cable modem competition, most dramatically spurs incumbent LEC mass market xDSL deployment. At minimum, it is clear that the combination of line sharing and cable modem provide more incentive that cable modem alone. The Commission recently released data showing that, among advanced services lines,[29] ADSL lines increased by 52% during the last six months of 2002, compared to a 22% increase for cable modem service in the same time period.[30] For the full year 2002, ADSL advanced service lines increased by 105%, while cable modem connections increased by only 90%.[31] Industry reports now suggest that DSL deployment will continue to overtake market share from cable modem deployment – a direct consequence of three years of competition from line

[29] The FCC defines advanced service lines as lines exceeding 200 kilobits per second in both directions. *See High-Speed Services for Internet Access: Status as of December 31, 2002*, at 1, n. 1.

[30] *See High-Speed Services for Internet Access: Status as of December 31, 2002*, at Table 2.

[31] *See High-Speed Services for Internet Access: Status as of December 31, 2002*, at Table 2.

sharing.[32] In fact, as FCC Chief Economist Simon Wilkie recently stated, the FCC's internal economic studies indicate that for every line shared line unbundled, incumbent LECs responded to the competitive pressure by deploying four retail DSL lines.[33] In light of this data, there is no question that facilities-based competition via line sharing, not cable modem, has been the primary driver of incumbent LEC DSL deployment.

IV. Conclusion

Line sharing has demonstrably promoted the goal of encouraging facilities-based deployment by incumbent LECs and competitive LECs alike. When the FCC adopted line sharing rules in 1999, its own data showed 115,000 residential ADSL lines in service, including both incumbent and competitive LEC lines. Today, as a direct result of line sharing, the FCC reports 6.5 million ADSL lines in service, both by incumbent LECs and competitive LECs – an increase of over five thousand percent.[34] In order to ensure the continued viability of broadband competition – and that consumers continue to enjoy lower prices and widespread innovation – the Commission should promptly grant the Earthlink petition. At the very least, the Commission should grant the stay requested by the CHOICE Coalition while the Commission and/or the Courts consider the issue.

Respectfully submitted,

THE CHOICE COALITION

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[32] *See* Goldman Sachs Telecom Weekly, "The Americas – US Spotlight" (Aug. 4, 2003) ("As expected, the market share reversal in 1Q2003 was indeed an inflection point in the DSL vs. cable battle, and DSL is now firmly gaining share against cable.").

[33] *See Communications Daily*, Monday Oct. 20, 2003, at 10.

[34] *See Deployment of Advanced Telecommunications Capability: Second Report*, CC Docket No. 98-146, Second Report, FCC 00-290, para. 72 (2000).

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CERTIFICATE OF SERVICE

I, Mary McDermott, hereby certify that on this seventeenth day of November 2003, copies of the foregoing REPLY TO OPPOSITIONS OF THE COALITION FOR HIGH-SPEED ONLINE INTERNET COMPETITION AND ENTERPRISE (CHOICE) were served upon the following parties via First Class Mail:

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